

No. 291.

IN THE

United States Circuit Court of Appeals,
OF THE NINTH CIRCUIT.

United States of America,
Plaintiffs in Error,
vs.
Chung Shee,
Defendant in Error.

Answering Brief for Defendant in Error.

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IN ERROR TO THE UNITED STATES DISTRICT
COURT, SOUTHERN DISTRICT OF
CALIFORNIA.

FILED

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ANSWERING BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

In the statement contained in its opening brief, plaintiff in error seems to take the view, that the only issue tendered by defendant in error on her application for habeas corpus before the Oregon District Court, was that of marriage. (Brief p. 5).

As we understand, the petition tendered not only the question of marriage, but also that of the status of Chung Chew, and the restraint of defendant in error, all of such issues being incidental to the main issue as to the right of plaintiff in error to enter the country.

The evidence shows, also, that on her discharge, defendant in error and Chung Chew left court together and thereafter resided together as husband and wife and continued to live together as husband and wife until the death of the former at Los Angeles. (Tr. pp. 50, 52, 54, 55, 56.)

The petition for the writ of habeas corpus filed in the Oregon District Court, shows that the collector of customs refused to hear any evidence as to her right to land, other than that of defendant in error herself (Tr. p. 43), but as to what the finding was on this allegation, does not appear.

In his opinion, Judge Bellinger found that Chung Chew, was a bona fide merchant at Portland; that a marriage according to the custom of China had occurred between the parties, Chung Chew, however, being domiciled in the United States at the time (Tr. pp. 46, 47).

The Court held, therefore, that the marriage was not solemnized under the Chinese law, which it must have been in order to be valid elsewhere; however, after careful investigation by attorneys a certificate was prepared, and, with passage money, forwarded to her, she came to the United States in pursuance of advice so to do given by her husband. The court further found that she was not a prostitute; that her action was in good faith; and held, that she did not belong to any class of persons within the exclusion acts.

POINTS RAISED.

The trial court here, held that the Oregon judgment

determined the right of defendant in error to enter the country; that such judgment is not subject to collateral attack herein, that it covered the issues and was conclusive in this case.

So holding, the court stated (Tr. p. 19), that it was unnecessary to decide the other points urged by the defendant in error, hence we do not here discuss such other points, but confine ourselves to those passed upon by such court, considering that such court correctly enunciated the law as to the points by it passed upon, and further considering that the judgment should be affirmed accordingly.

ARGUMENT.

I.

In its opening brief herein, plaintiff in error (p. 11) says that, "the jurisdiction of the collector to make the order, and not the defendant's title to residence, was the issue presented before Judge Bellinger," and then, in support of such contention, cites cases arising under a statute different from that involved in the inquiry herein.

The petition for habeas corpus before Judge Bellinger was sworn to January 30, 1894, and the writ issued the same day, so that in determining the scope and effect of the Oregon proceedings, the law as it stood at that time only, will be taken into consideration, subsequent acts having no bearing thereon. Section 9 of the Act of May 6, 1892, being Chap. 126, 22 Stat. at L., p. 58, provides as follows:

"That before any Chinese passengers are landed from

any such vessel, the collector, or his deputy, shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law."

By Section 12, of the Act of Congress of September 13, 1888, it was provided: "That before any Chinese passengers are landed from any such vessel, the collector or his deputy shall proceed to examine such passengers comparing the certificates with the lists and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law; and the collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the Secretary of the Treasury and not otherwise.

Plaintiff in error maintains (Brief p. 11) that the jurisdiction of Judge Bellinger on the habeas corpus proceedings was limited to an inquiry into the jurisdiction of the collector to decide against the defendant's right of entry, but it will be noticed that the right sought to be taken away from the courts by the section just quoted, was not the right of inquiry into the collector's jurisdiction to act, but was the authority of the courts, theretofore exercised, of adjudicating upon "the right of any Chinese passenger *to enter* the United States."

In the case of *United States v. Loo Way*, 68 Fed. Rep. 477, the court says: "The books are full of cases in which the rights of Chinese persons to enter this country have been re-examined on habeas corpus, after

denials of such rights by customs officials; and I have not been able to find an opinion by any court in which the authority for such re-examination is questioned. It was, doubtless, in view of this unbroken line of decisions, and for the purpose of changing the law thus declared, that congress enacted the twelfth section of the act of September 13, 1888. With this section in force, the action of the collector, in the absence of fraud, would be conclusive and final."

There was no legislation subsequent to the act of September 13, 1888, in force at the time Judge Bellinger ordered the writ of habeas corpus for defendant in error to issue, January 30, 1894, which affected the question under review; hence it only remains to be determined whether section twelve of the act of 1888 controls. If it does, then Judge Bellinger was without authority to entertain the habeas proceeding, but if such section does not control, then he had not only authority to examine into and fully determine the right of defendant in error to enter the United States, but also had the authority to do so by proceedings in the nature of habeas corpus.

In the case of the *United States v. Lee Hoy*, 48 Fed. Rep. 825, the court proceeding upon the theory that section twelve of the act of 1888 was in force, held that the action of the collector was final and not subject to review by the courts. But in such case writ of error was sued out to this court, this court holding on such appeal, that the operation of section twelve of the Act of 1888 depended upon the ratification of a then pending treaty with China, which treaty was never ratified, hence such section never

took effect. The cause referred to appears in 1 C. C. A. 516 and 50 Fed. Rep. 271, under the title of the United States v. Gee Lee.

The court then further says: "It follows that section 12 of the statute, which is wholly taken up with the future landing or excluding of Chinese passengers by the collector, is not in force, and his act in admitting or refusing Gee Lee to enter the United States is not final.

As stated in the Loo Way case, *supra*, the Gee Lee case is authoritative, hence section twelve of the Act of 1888, being of no effect, the case at bar is to be determined under the law as it stood prior to the passage of the Act of 1888.

In United States vs. Jung Ah Lung, 124 U. S., (Lawy Ed.) 591, 8 Sup Ct. Rep. 663, the Supreme Court also holds that the collector's acts are reviewable by the court.

In that case, the government contended that the Act of May 6, 1882, Ch. 126 (22 St. 58), as amended by the Act of July 5, 1884, Ch. 220, (23 St. 115) took away from the courts the right to issue the writ, but the court said: "We see nothing in these acts which in any manner affects the jurisdiction of the courts of the United States to issue a writ of habeas corpus. On the contrary, the implication of section twelve is strongly in favor of the view that the jurisdiction of the courts of the United States in the premises was not to be interfered with. That section provides that any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came
* * * after being brought before some justice, judge,

or commissioner of a court of the United States, and found to be one not lawfully entitled to be or remain in the United States." So that, if it were to be claimed by the United States that Jung Ah Lung, if at any time he should be found here, was found unlawfully here, he could not be removed to the country from whence he came unless he were brought before some justice, judge, or commissioner of a court of the United States, and were judicially found to be a person not lawfully entitled to be or remain here. This being so, the question of his title to be here can certainly be adjudicated by the proper court of the United States, upon the question of his being allowed to land."

Not only does it thus appear from the three cases cited that the acts of the collector can be reviewed by the court, cases which have not been overruled, but as we construe it, the United States attorney who so ably in this case, contends for the finality of the collector's acts, in the Loo Way case, *supra*, presented just as ably, the opposite view. The collector permitted Loo Way to enter December 12, 1893. On April 4, 1895, he was arrested for unlawfully coming into the country. He urged that the action of the collector was final, the United States attorney urging the contrary. The defendant was ordered deported and sued out writ of error to this court and the cause comes up for hearing at the present term. In his brief Loo Way contends for the same ruling which the United States asks for in this case, it contending therein, however, for the opposite ruling, as we apprehend, not having seen its brief. Hence plaintiff in error herein, contends both ways, and as

and as both views cannot be correct, it must either admit that the judgment against Loo Way was incorrect or else admit that Judge Bellinger had authority to pass upon the right of defendant in error to enter the country.

But not only do the Jung Ah Lung and Gee Lee cases, above cited, hold that the court may pass upon the right of the party to enter the United States, but they also hold that the court may so do upon proceedings by way of habeas corpus.

In the Jung Ah Lung case, the facts were the same as those in the case at bar, they being, that Jung Ah Lung was in port on board of vessel and denied landing by the collector. Jung sued out habeas corpus and the Supreme Court says: "We are of opinion that the case was a proper one for the issuing of the writ."

In the Gee Lee case the court expressly so holds, saying that, "the truth of the matter may be inquired into, in any appropriate judicial proceeding, of which, habeas corpus and arrest for being unlawfully in the United States are two."

In contravention of these holdings, plaintiff in error herein admits that in these Chinese habeas corpus cases the court may sometimes, in effect, make an independent inquiry into the Chinaman's right to enter the United States, but contends that the question herein involved should be determined not by what in practice is customary, but according to the theoretical limits of the court's jurisdiction, and in support of what is termed theoretical limit, cites case of Stupp, 12 Blatch. 501, 519. (Brief pp. 13, 14).

This case has no application herein. Stupp was alleged

to have committed murder and arson in Belgium and was committed by a court commissioner to await extradition, whereupon he sued out habeas corpus, which the court held was the proper procedure. In discussing the scope of the inquiry to be made under the writ, however, the court said (p. 507): "When a person is held on process on a final judgment, after conviction, after a trial on an indictment, and a habeas corpus is issued, the return to the writ states, as the cause of his detention, the process, and, either on such return alone, or by the aid of a certiorari, the final judgment, the conviction, the fact of a trial, and the indictment are brought before the court. These are the 'facts' of the case on the habeas corpus. The particulars of the evidence which led to the conviction are no part of such facts. In determining, on habeas corpus, the 'fact' of the case, the court does not determine what were the facts which constituted the crime of which the party was convicted. It only determines whether there was an indictment, a trial, a final conviction, a final judgment, a sentence and process of execution, and jurisdiction of such proceedings." This correctly states the law, but, it has no application here.

The cause arose under the Belgian treaty, and Stupp was held under process of a court of commissioner after hearing had, the charge being a criminal one. The commissioner was a judicial officer in whom is specially confided by law the authority to do just what he did do in the Stupp case. In the case at bar the collector was not a judicial officer; he could issue no process of deportation, and his action as above shown, was not final. In fact in the Jung Ah Lung case *supra*, the 'Supreme Court in

construing section 9 of the act of May 6, 1882, under which the collector acts, holds that the provisions of such section merely specify "the *executive* officer who is to perform the duties prescribed, and that no inference can be drawn from that or any other language in the acts that any judicial cognizance which would otherwise exist is intended to be interfered with."

Nor are the cases cited by plaintiff in error of *In re Day*, 27 Fed. Rep., 678; *In re Cummings*, 32 Id, 75; *In re Dietze*, 40 Id, 324; *In re Vito Rullo*, 43 Id, 62 and *In re Bucciarello*, 45 Id, 463, in conflict with this holding.

The Day case arose under the act of August 3, 1882, entitled: "An act to regulate immigration, Ch. 376, 22 Stat. 214.

All of the other cases mentioned arose under the alien contract law of February 26, 1885, Ch. 164, 23 Stat. 332, and the act amendatory thereof of February 23, 1887, Ch. 220, 1886-1887, p. 414.

By both such immigration act and the alien contract act as amended, it is especially made the duty of the secretary of the treasury to carry the provisions thereof into effect, he doing so through state officials.

The rule under which such cases were decided is stated in the Vito Rullo case, *supra*, it being there held that the immigration officials in acting under such statutes constitute a *quasi* judicial tribunal, with authority to inquire into the immigrant's right to land and determine the same, the court, per Judge Brown, using the following language: "It has been repeatedly held in immigration cases that, under the statutes above

referred to (1885-1887), and others similar, the court upon habeas corpus is not authorized to take evidence upon the original question as to the facts concerning the immigrant's right to land, where another tribunal of a *quasi* judicial character is constituted by law for the purpose of inquiring into such facts, and determining the immigrant's right; but that the office of the writ of habeas corpus is to inquire into the jurisdiction exercised by that tribunal, and whether it has kept within its legal limits, and proceeded according to law."

Being a *quasi* judicial tribunal, of course, the office of the writ of habeas corpus would be only to inquire into the question as to whether its jurisdiction had been exceeded. In cases arising under the Chinese exclusion acts, it has been held, as above shown, that the collector was not a judicial tribunal, did not exercise judicial functions and his acts were not determinative of the right of defendant in error to land, hence, the cases relied upon by plaintiff in error, avail nothing here, they not being in point.

The point referred to by plaintiff in error in the cases in *Horner vs. United States*, 143 U. S. 570 and *United States vs. Pridgeon*, 153 U. S. 63, falls under the same rule referred to in the immigration cases, the question sought to be reviewed under the writ being by law confided to a judicial tribunal for determination.

The vice of plaintiff in error's position is, that it either fails to recognize that where the acts in question are of a mere ministerial or executory character the rule as to the scope of the writ of habeas corpus is more extensive and different from what it is where the acts

are judicial; or else it incorrectly assumes that, under the Chinese exclusion acts as they existed at the time in point, the collector acted judicially.

As we understand, where the power of final determination is not lodged, the facts may be inquired into on habeas, but where the power of final determination is confided, the facts may not be so reviewed, except in so far as may be necessary to determine the question of excess of jurisdiction. As above stated in the Jung Ah Lung case, it is held that the collector does not act judicially under the Chinese exclusion acts in force, and it further holds that the right to land may be determined on habeas corpus.

But plaintiff in error seeks to impeach this construction of that decision as to this latter point, but the construction of such case by it contended for, cannot be maintained, especially in view of the holding therein that the collector did not act judicially. To maintain the construction of such decision by it contended for, plaintiff in error inclines to the view that the court intended to be understood as holding, that the right of a Chinaman to be here could be inquired into only in what is termed "an original proceeding," that is, one instituted directly in court to deport a Chinaman after he has entered. But in so contending, plaintiff in error evidently misapprehended the effect of the language used in the opinion, to wit: "This being so, the question of his title to be here can certainly be adjudicated by the proper court of the United States, upon the question of his being allowed to land." This language, we submit, is not inadvertent and means, that upon the application for leave to

enter, the right to so enter can, then and there, be adjudicated by the court. To hold otherwise would deny the Chinese all right to appeal to a court as to his right to enter or remain, but would give the United States the right to appeal thereto for purposes of deportation. If the applicant had no right of appeal to the courts, why did Congress pass the amendment of 1888, depriving him of that right by therein providing that the action of the collector was final except on appeal to the secretary of the treasury? Did Congress mistake the effect of the Jung Ah Lung decision? or did it do an idle act? The decision had been rendered some seven months (February 13, 1888), before the amendment referred to of 1888, (September 13, 1888), hence Congress must have had some knowledge thereof. If we read aright the note to section 72 of Church on Habeas Corpus (2nd Ed.), that eminent author construed the decision as did, evidently, Congress. Was he also in error?

The Gee Lee and Loo Way cases hereinbefore cited are in entire harmony with the construction on this point of the Jung Ah Lung case placed thereon by the trial court herein.

Our contention also finds support in *In re Chow Goo Pooi*, 25 Fed. Rep. 77, the court therein saying: "We are unanimously of the opinion that when a Chinese person is detained on board of a ship and refused the right to land, whether by authority of the master in pursuance of the provisions of the Chinese restriction act, or by the refusal of the collector to grant him permission to land, he is restrained of his liberty under or by color of the authority of the United States, and

that he is entitled as of common right to sue out a writ of habeas corpus, that the legality of his detention and restraint may be passed upon by the court." It is further said (p. 80): "The power exercised by the magistrate is a power summarily to investigate and determine the right of a person to enter or remain in the country—a power sometimes conferred on commissioners of immigration, but by this law confided to a 'justice, judge or commissioner.'" It is also said therein, after mentioning the large number of cases pending before the court (p. 82): "It is, therefore, an urgent necessity that Congress by committing that duty to commissioners, or by some other mode, should relieve the courts of the burden of passing on these cases. I know of no subject that more imperatively demands the attention and the interposition of our representatives in Congress. And to procure this relief to the courts, it is necessary that the decision of the commissioner, or other authority to whom the right to determine these questions is confided, shall be final, for if an appeal can be taken in every case, the same obstruction to the ordinary business of the court will arise."

II.

Having the authority so to do in such proceeding, Judge Bellinger, on the habeas corpus, adjudicated the right of defendant in error to enter the United States, and such adjudication being in her favor it is, unless something has since occurred to make her amenable to deportation, conclusive of her right to now be and re-

main here, and such right cannot be questioned in this action.

It is not claimed that defendant in error is amenable to deportation by reason of any facts arising since the rendition of the habeas judgment, so we do not discuss such point.

We admit, as is contended for by plaintiff in error that, where an adjudication upon habeas corpus is favorable to a defendant held upon void or insufficient process in a criminal action, that the adjudication is not decisive of the question of guilt or innocence, but that is because the inquiry is limited to the question as to whether the inferior tribunal exceeded its jurisdiction, such tribunal being judicial and by law invested with authority to determine the particular cause before it.

But as is shown in Point I herebefore, the collector had no authority to determine, hence the inquiry on the habeas would extend to the merits and be decisive thereof and the rule above referred to have no application herein.

Here it is, that plaintiff in error falls into error, it assuming that the collector was a judicial officer with authority to finally determine; that defendant in error was in custody under some judicial process and that, aside from cases touching the custody of children, habeas corpus issues only in cases where the petitioner is held under judicial process in which cases it is limited to an inquiry as to excess or non-excess of exercise of jurisdiction.

We think it clear that the collector was not a judicial officer and that defendant in error was not held by process of any kind.

As to the cases where habeas will lie, we think the rule is correctly stated in the opinion of the trial court herein, wherein it is said (Tr. p. 10), “ ‘The writ of habeas corpus may be resorted to—1st, by or on behalf of some person who is imprisoned or otherwise deprived of his liberty; or, 2, on behalf of some person * * *’ ” If this be the correct rule then habeas issues whether the restraint be or be not under process. That such rule is consonant with reason appears when we consider that were it otherwise, the master of a vessel, with or without the additional direction of a collector, might detain any passenger on shipboard until the liquidation of certain claims alleged to have been incurred during the passage, and the detained passenger be in custody, without remedy.

The questions which were determined by the judgment on habeas were such as were raised by the petition, the return, if any, and such facts as were necessarily raised, whether impliedly or otherwise. The petitioner showed the restraint—the refusal to permit the petitioner to enter the United States—and the court adjudicated the right to enter the United States; the judgment appearing at page 45 of the Transcript and showing that the United States intervened and that defendant in error was “discharged from the detention and restraint complained of in said petition.” The petition alleges (Tr. p. 42) that acting upon the decision of the collector to the effect that petitioner had no right to land in the United States, the master of the steamer refused to permit the petitioner to land, and restrains her of her liberty on board said ship; that on January, 30, 1894, the

collector had a hearing before him upon the right of petitioner to land in the United States, and then and there decided that she had no right to land and rejected her claim that she had such right and the master acted upon such decision; and that the collector refused to hear testimony other than that of petitioner—defendant in error. Thus it appears that the ultimate fact advanced by the petition was the right to enter, a fact which must either have been admitted or controverted. In any event such facts must not only have been, but were determined on the hearing and included in the judgment rendered. The marriage was but a probative fact, and it matters not that the reasoning was mostly confined to such probative fact. The reasoning may have been right or wrong, but so long as the judgment was right it must stand. But even though the judgment was wrong it could not be herein attacked, because, as above shown, the court had jurisdiction of the question before it; viz: the question of the defendant in error's right to enter the United States.

The merits being before the court for adjudication, the case of *State vs. Fley*, 2 Brev. 338, has no application herein, that being a case wherein only the question as to the validity of the process was to be determined.

As to the finality of the judgment on habeas corpus rendered by Judge Bellinger we submit that the language of the trial court (Tr. pp. 10-12) correctly states the law and that the cases there cited sustain the position taken, they being 1 *Freeman on Judgments*, sec. 324; *Bonnett v. Bonnett*, 61 Iowa, 199; *Church on Ha-*

beas Corpus, Sec. 386; ex-parte Jilz, 64 Mo., 205; in re Crow, 60 Wis., 713; Yate's case, 6 Johns, 337.

IN CONCLUSION.

As hereinbefore stated we herein argue only those questions upon which the trial court based its judgment, notwithstanding that according to our view certain other points urged by us before the court are worthy of consideration. Such being the case, we consider that if this honorable court should hold adversely to the trial court, that the judgment rendered should direct a new trial, rather than direct a deportation. That a judgment of reversal, if any, should so provide, is also apparent when it is remembered that the trial court, adversely to the contention of defendant in error, who claims to be Lum Liu Ying, found that she is Chung Shee, a finding in which she does not acquiesce, but objection to which she is herein precluded from urging by reason of the judgment having been in her favor.

We do not concede, however, that the judgment heretofore rendered should be reversed, but, on the contrary, maintain that the same should be upheld and the adjudication hereon be in favor of defendant in error.

Respectfully submitted,

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